

FORGING THE ROAD AHEAD: AN ESSAY ON JUSTICE AND TRANSFORMATION IN LEGAL EDUCATION

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I am honored to submit this essay offering some views on the role of legal education in preparing students to be “justice-makers” in our society. There has always been an ambiguous relationship between “law” and “justice” in American legal education. Many students come into the first year of law school assuming that our legal system is set up to effectuate justice. Indeed, we often use the terms “justice system” and “legal system” interchangeably. However, as students march through the standard law school curriculum, they almost inevitably note that most professors are not soliciting students’ views on whether a given law or holding in a court case is “just.” Students are instead tested on their ability to manipulate the “black letter law” and perhaps engage a set of policy arguments intended to inspire the court to decide a case in favor of one party or another. In fact, if we examine the legal system through a critical lens, we will find that many of our laws and institutions are set up to privilege the interests of particular individuals or to serve prevailing social attitudes. Given this reality, how can law be a neutral force in the effort to achieve “justice”? Is “justice” altogether irrelevant in preparing students to be lawyers?

I am going to argue in this essay that “justice” has never been more relevant, and I am very proud of the law students who founded the Arizona State University *Law Journal for Social Justice* because they have recognized that we are in an era where justice matters a great deal, not only to those of us who live and work in the United States, but to the global citizens of this planet. The caveat, of course, is that I am known to most of my colleagues at ASU as a bit of a rebel. Some have more kindly referred to me as an “idealist.” I accept those attributions and am firmly committed to my belief that the law is a space of transformation. The law cannot be a wooden monument to the past, and it must not be manipulated for the current gain of a privileged few. The term “justice” imposes a moral boundary to gauge the efficacy of our legal system, as it impacts countless lives, both here and abroad.

At the outset, I would like to point out that the term “justice” is one of the organizing principles of the United States Constitution. The Constitution’s Preamble specifies the Framers’ intent to further “a more perfect Union” and to “establish Justice” for “ourselves and our Posterity.”² There are other goals, of course, but those are the first two that the Framers identified. This signals that it was (and is) our collective enterprise as citizens of this U.S. Constitutional democracy to form a just society. Not just any society, but a JUST society. So, of course, our institutions, including our legal institutions must reflect that commitment.

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² U.S. CONST. Pmb1.

There are, of course, many views about what “justice” entails. As political philosopher Michael Sandel observes, questions of how individuals should treat one another, what the law should be, and how society should be organized all involve fundamental considerations of “justice.”³ Sandel further observes that there are several different ways to measure compliance with the norm of “justice,” including those based on principles of social welfare, freedom and autonomy, and virtue.⁴ However, under any of these accounts, there must be a fair distribution of goods and freedoms. Thus, a basic working definition of justice is founded on the notion that individuals within society are entitled to a fair distribution of goods and freedoms.

It would seem to follow, then, that the various institutions that comprise our legal system would fairly serve our society. This essay engages that assumption by examining the synergy among three pivotal structures of the American legal system: the American law school, the United States Supreme Court, and American legal doctrine (including statutory, treaty, and case law). As this essay explains, these interconnected structures can operate to accomplish “transformation” in the law. By transformation, I mean a complete change in the form, nature, and function of the law. Such a transformation, of course, might either facilitate or undermine justice. Therefore, it is important to be cognizant of how these structures are being manipulated by those who have access to the legal system.

Part I of this essay examines the transformation in the law that is occurring through Supreme Court advocacy, and explores the relationship of this transformation to legal education. Part II of the essay draws upon the jurisprudence of Critical Race Theory to examine the themes that reside at the heart of this transformation and attempts to generate a counter-narrative of transformative justice. The concluding section of the essay offers some thoughts about what this discussion might entail for legal education within Arizona, with a specific focus upon my own institution, Arizona State University.

I. The “Quiet Transformation” of the Law:

This essay was inspired in large part by Professor Richard Lazarus’s 2008 law journal article, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*.⁵ I am fascinated by “transformation” in all phases of life and the law, and what could be more fundamental to the inner workings of the law than an esteemed Bar Association of attorneys and the U.S. Supreme Court? Professor Lazarus is a well-known Harvard law professor, formerly on the Georgetown University law faculty, and he was the Faculty Director of the Supreme Court Institute at Georgetown at the time he wrote this article.⁶ The article comprises approximately eighty pages of the *Georgetown Law Journal* and contains over three hundred carefully documented footnotes for the text. In other words: the article is a highly credible contribution to legal literature by a highly respected expert on the U.S. Supreme Court.

³ Michael J. Sandel, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 19-20 (1st ed. 2009).

⁴ *Id.* at 19-21.

⁵ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008). I am indebted to my Research Assistant, Tim Koch, for sharing this article with me. The article inspired this essay.

⁶ Professor Richard J. Lazarus is currently the Howard J. and Katherine W. Aibel Professor of Law at Harvard Law School.

Lazarus's article documents an extremely valuable insight, which is that during the past two decades, the U.S. Supreme Court's jurisprudence has been heavily influenced by "an elite private sector group of attorneys who are dominating advocacy before the Court to an extent not witnessed since the early nineteenth century."⁷ As Lazarus shows, the advocacy of this elite group of attorneys has "quietly transformed" the Court and the nation's laws.⁸ The article details "the emergence of a new elite Supreme Court Bar and the resulting transformation of the Court," in terms of the Court's docket and its rulings. Lazarus also paves the way for a discussion of legal education by noting the role of the Supreme Court clerks and the potential role of law school clinics, such as Georgetown's, which contain a Supreme Court advocacy component.

I will summarize the key features of Lazarus's analysis. Lazarus notes that in the nineteenth century, during the formative years of the Supreme Court, it was very difficult to physically access Washington, D.C., and thus, a select few attorneys from Maryland, Virginia, and Pennsylvania tended to argue most of the cases before the Court. This practice changed over time, and by the beginning of the twentieth century, there was no longer a dominance of certain private attorneys arguing before the Court, although the Office of the Solicitor General, which represents the United States, did and has continued to dominate Supreme Court practice. This dominance is expressed not only in the identity of the attorneys who argue the cases, but in the fact that the Court typically grants the Solicitor General's petitions for writ of certiorari 70% of the time, as opposed to the less than 3-4% rate that exists for all other petitions.⁹

The modern turning point came in 1985, when the nation's "leading law firms" began to develop special Supreme Court appellate practice units led by attorneys who had served in the Office of the Solicitor General and, in some cases, were themselves former U.S. Solicitors.¹⁰ Some states even followed this practice in building their own Office of the State Solicitor General.¹¹ Lazarus also documents "the recent proliferation in many of the nation's leading law schools of Supreme Court clinics," in which law students work under the supervision of law faculty and often "the same private law firm lawyers" to take "pro bono cases on behalf of individuals and organizations."¹² Thus a small group of elite private attorneys has gained dominance in the cases selected for litigation before the Supreme Court, in state governance, and in legal education at elite law schools.

At one level, this effort could be seen merely as an attempt to "improve" Supreme Court practice by ensuring that the "best" attorneys in the nation argue the cases and that law students at the "best" law schools are trained accordingly. What could be wrong with that? Let's also give the elite members of the Supreme Court Bar due credit for being willing to lend support to a few "pro bono" clients. The "transformation" that Lazarus documents, however, is truly chilling for any group committed to a robust notion of social justice. This article does not document a neutral attempt to achieve the best lawyering. Rather, the article documents the stunning impact of this elite group of

⁷ *Id.*

⁸ *Id.* at 1490.

⁹ *Id.* at 1493.

¹⁰ *Id.* at 1497-1500.

¹¹ *Id.* at 1501.

¹² *Id.* at 1502.

attorneys on the Supreme Court's jurisdiction, its decisions on the merits, its composition, and the nature of the putative "pro bono interests" that it chooses to support.

Consider jurisdiction: It turns out that this elite group of private attorneys influences the cases that the Supreme Court takes as well as the cases that the Court denies, although we might never know this, given the fact that briefs in opposition to petitions for certiorari ("cert") tend to be "ghost written, without the names of those expert Supreme Court advocates actually appearing anywhere on the brief itself."¹³ Moreover, it turns out that the elite experts also have ways to manipulate a particular outcome (i.e. denial of cert) by external factors, such as "having related legislation introduced before Congress or persuading a federal agency to put out a notice of possible rule-making."¹⁴ The influence of the elite experts is intensified by the Supreme Court's current practice of taking a reduced number of cases. In 1980, 102 cert petitions were granted (not including those filed by the U.S. Solicitor's Office). That number has steadily declined, and by 2007, 65 cert petitions were granted, and of that number, 35—or 54%—were filed by "expert" counsel.¹⁵ The dominance of the elite advocates is further demonstrated by the declining percentage of cases argued by attorneys appearing for the first time before the Supreme Court. In 1980, 76% of the oral arguments were first-timers, as opposed to 2% who had argued ten or more prior cases. In 2007, 43% of the oral arguments were first-timers, 28% were by attorneys with ten or more prior arguments, and 24% had more than one argument before the Court *in the same term*.¹⁶

Consider next the "merits" of the cases: It turns out that the elite experts command very high prices for their services, which is quite understandable given their rate of success with the Court. However, it also turns out that the clients who can afford these services are mainly corporations who are trying to maximize their ability to create profits in a world where onerous legal doctrines and statutes related to corporate liability (including punitive damages for tortious conduct), antitrust regulations, labor regulations and the like might tend to curtail profits. Lazarus documents the fact that the biggest "transformation" in the law has been with respect to business interests. Historically, the Supreme Court did not tend to grant certiorari in business cases. Today, over half of the Supreme Court's docket is business cases, and "what the private Supreme Court Bar has accomplished over the past decade is to persuade the Court to enter into areas of law of interest to the regulated community to correct what business perceives as problematic legal doctrine."¹⁷ The change in the substantive law is marked. This is well-illustrated by the Supreme Court's 2010 opinion in *Citizens United v. Federal Election Commission*, which held for the first time that corporations are legally entitled to exercise the same political free speech rights of individuals.¹⁸ According to Lazarus, the Supreme Court has overruled its own precedents to establish a supportive structure for corporate interests which works a "transformation" of the law as notable as the litigation that led to *Brown v. Board of Education*, although Lazarus is careful to say that it is not so "socially transformative" as what the NAACP achieved in the civil rights era.¹⁹

¹³ *Id.* at 1511.

¹⁴ *Id.*

¹⁵ *Id.* at 1516.

¹⁶ *Id.* at 1520.

¹⁷ *Id.* at 1532.

¹⁸ *Citizens United v. Fed. Election Comm'n*, 130 U.S. 876 (2010).

¹⁹ Lazarus, *supra* note 5, at 1548.

I would like to differ with Lazarus on this last assertion. I will argue that this dominance of the “elite experts” is definitely achieving a social transformation, although things are headed in precisely the opposite direction of what the architects of the U.S. Civil Rights movement were trying to accomplish. Let’s look at who is included within the elite group and who is excluded. Inclusion and exclusion, after all, have always been the twin pillars of American “equality” and American “oppression.” The elite experts hired to represent business interests are taken from the ranks of those who have previously represented the United States government. They have the right credentials. They come from the top law schools and they know the politics of U.S. law, inside and out. It turns out that the Supreme Court clerks (who also come from the elite law schools and also have the right credentials) have a very important role in this process. The law clerks are in fact the ones who scrutinize pleadings at the jurisdictional stage, reading and summarizing the briefs for the Justices and advocating which ones should be granted certiorari. Lazarus says that the law clerks are “more heavily influenced by the advocates at the cert stage than any others.”²⁰ The law clerks share the same intellectual pedigree as the elite attorneys, and they rely on the expertise of this group of advocates, including their intimate knowledge of “the concerns and predilections of the individual Justices.”²¹ And, indeed, we cannot forget that the members of the Supreme Court, including the Court’s current Chief Justice, are often selected from the ranks of the elite experts. As Lazarus notes, Chief Justice Roberts was selected by President Bush “based on Robert’s record as a leading Supreme Court advocate rather than his judicial record.”²²

So, what does this mean for the legal institutions of the United States? A cynic might view the factual data presented by Lazarus as proving that the highest Court of this country is directed by an inner circle of political elites who are unabashedly reworking legal doctrine to protect powerful corporate interests. The elite law schools provide the social and economic environment for elitism to flourish. In other words, a cynic would term this entire structure “an old boy’s club” and posit that there is nothing “fair” or “just” about this particular distribution of “goods and freedoms.” According to Lazarus, however, the identity of the elites as the dominant force in Supreme Court advocacy is based upon their merit. They were trained at the best law schools, they were hired into positions of political and legal prominence, they are the “best” advocates money can buy and corporations are shelling out the money to buy them. What is remarkable about this? Isn’t this consistent with our basic Constitutional principles of neutrality and equality? There is nothing wrong with “merit,” is there? And there is nothing wrong with being a “hired gun.” In fact, it’s virtually an American tradition. If a particular group needs the *best* advocate, they can well buy their services, right? In fact, this is what has inspired many litigants, including some Native American tribal governments, to hire the elite Supreme Court advocates to argue their claims in front of the Supreme Court. Of course, it is a bit of a disturbing twist to find out that tribal claims have experienced a steady LOSS in the post-1987 Supreme Court, no matter whom the tribe retains.²³ In fact,

²⁰ *Id.* at 1524.

²¹ *Id.* at 1525.

²² *Id.* at 1522.

²³ See Matthew L.M. Fletcher, *2010 Dillon Lecture: Rebooting Indian Law in the Supreme Court*, 55 S.D.L. REV. 510, 512 and n. 16 (2010) (citing work by Federal Indian law scholars David Getches and Alex Skibine that demonstrates “how tribal interests have been on the down side of more than 75% of the Indian law cases decided by the Supreme Court since about 1987”).

Professor Matthew Fletcher asserts that tribal organizations have attempted to develop an approach to Supreme Court litigation that draws upon a similar strategy as the business interests, including in many cases, the use of the elite Supreme Court advocates.²⁴ The results, however, have shown overwhelming losses for tribal litigants in every Supreme Court case since 2004.²⁵ Clearly, other dynamic is at play.

Building on the insight expressed by some Critical Race Theory scholars—that the United States tends to transition through intervals of legal “reform” and “retrenchment”—the next section of this essay will examine the recurring themes and movements that cause inequity in the Supreme Court’s jurisprudence. I will argue that is necessary to build an effective and cohesive counterweight to the current “quiet transformation” that is changing American law.

II. The Need for Transformative Justice in the American Legal System

So does the “quiet transformation” in the law that Lazarus describes promote “justice”? Given the dominance of corporate interests, even Lazarus admits that the transformation in the law could be achieved with a more “fair distribution” of advocacy resources. In particular, he discusses the role of the elite Supreme Court advocates in amicus practice and in pro bono cases. There might be hope, for example, if civil rights litigants could hire the elite advocates to author amicus briefs that would encourage the Court to save the more forward-thinking doctrines of the Civil Rights Era, say, affirmative action. In fact, Lazarus claims that the elite advocates are also prominently featured in amicus practice, and he goes on to assert that “the most well-known example of a filing by an expert Supreme Court advocate apparently influencing the outcome of a case occurred in *Grutter v Bollinger*, which evaluated an equal protection challenge to the University of Michigan Law School’s affirmative action program and ultimately upheld the program.”²⁶ According to Lazarus, the elite Supreme Court advocates filed an influential amicus brief promoting the use of affirmative action on behalf of “retired military generals.”²⁷ Justice O’Connor actually mentioned that amicus brief in her opinion for the Court, claiming that the “skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”²⁸ O’Connor then cited the amicus brief filed on behalf of “high-ranking retired officers and civilian leaders of the United States military,” who assert that “based on their decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”²⁹ Aha! National security! Now, *that* is a concept that the Supreme Court understands, and, in a classic demonstration of what the eminent legal theorist Derrick

²⁴ *Id.* at 517-18.

²⁵ *Id.* at 517.

²⁶ *Id.* at 1544.

²⁷ Lazarus, *supra* note 5, at 1544 (describing this brief as possibly “the most influential amicus brief in the history of the Supreme Court”).

²⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁹ *Id.*

Bell termed “interest convergence,” the Supreme Court signed off on the legitimacy of the law school admissions policy.”³⁰

To extend the point a bit further, it makes sense that in an era of global warfare, tensions on the border, inner-city strife, and the like, the United States would need some diversity within its armed forces and its law enforcement units. Diversity promotes national security. This makes sense to the Court. By analogy, Professor Bell famously maintained that the result in *Brown v. Board of Education*, which outlawed the *Plessy v. Ferguson* “separate but equal” doctrine in the context of public secondary education, was the result of a rare convergence in the interests of blacks and whites within the dominant society.³¹ Bell argued that *Brown* did not represent a wholesale transformation of American race relations, but rather a moment in time in which segregated public schools were simply bad for America, *given the context of its national and global agendas*. This convergence, of course, faltered at the remedial stage, when whites began to resist enforcement strategies designed to integrate black children into white schools.

Similarly, in *Grutter*, the minority groups who are the classic beneficiaries of affirmative action and who traditionally lack access to justice were assisted by a dominant group who had its own interest in protecting diversity. Justice O’Connor’s opinion on behalf of the Court carefully described the Michigan law admissions program as quite inclusive of all forms of diversity, thereby expressing a permissible form of “educational autonomy” in the law school’s effort to train “our Nation’s leaders.”³² She carefully qualified “race-conscious admissions policies,” however, and said that these must be limited in time, suggesting that in 25 years, there will be no further necessity for such programs.³³ In fact, the vast majority of affirmative action cases issuing from the Supreme Court after 1985 has undercut the advances of the civil rights era, promoting the view that affirmative action is only permissible as a limited remedy for intentional and demonstrated discrimination by a particular entity.³⁴ The holding in *Grutter* is at this very moment in jeopardy due to an equal protection challenge to the University of Texas admissions program, presently pending a grant of certiorari in the U.S. Supreme Court.³⁵ Adam Liptak, the *New York Times* Supreme Court correspondent, terms the case of *Fisher v. Texas* the potential “last stand” of “college diversity.”³⁶ The scholars and attorneys that Liptak interviewed noted that the *Grutter* opinion was very close, with only a 5 member majority, and that the composition of the Court has changed. The decision

³⁰ See Derrick A. Bell, Jr., *Brown v. Board of Education and The Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980). See also KIMBERLÉ CRENSHAW & GARY PELLER, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, 20-29 (Kimberlé Crenshaw et al., eds., 1995).

³¹ *Id.* See also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004).

³² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

³³ *Id.* at 342.

³⁴ See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding, for the first time, that strict scrutiny is the operative standard to assess the constitutionality of “benign” racial classifications, such as affirmative action programs); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that federal affirmative action programs are held to strict scrutiny analysis, which means that racial discrimination must be specifically proven and remedy must be narrowly tailored to the circumstances of the act of discrimination).

³⁵ See *Fisher v. Texas*, 556 F. Supp. 2d 603 (W.D. Tex. 2008), *petition for cert. filed*, Sept. 15, 2011, available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2011/10/Fisher-v-UT-Cert-Petition.pdf>.

³⁶ Adam Liptak, *College Diversity Nears Its Last Stand*, N.Y. TIMES, Oct. 16, 2011, at 4.

upheld diversity as the “sole remaining legal justification for racial preferences in deciding who can study at public universities,” and Liptak quotes a 2007 opinion by Chief Justice John Roberts that limited the use of race as a mechanism to achieve public-school integration: “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’”³⁷ The days of affirmative action may be numbered, even in those states which have not chosen to statutorily bar the use of affirmative action.

Consequently, the doctrine generated by this Supreme Court may have a profound impact upon legal education. Law students constitute the pipeline for diversity within the legal profession, including attorneys and law faculty. Let’s specifically consider the role of faculty diversity in the American law school, including the role of law faculty as mentors, and their substantive contributions as teachers, scholars, and clinicians. Some commentators posit that “intellectual diversity” is always part of the law school environment, and Liptak quotes Yale Law Professor Peter H. Shuck’s belief (undoubtedly shared by many others): “Any experienced, conscientious teacher, regardless of race, could and would get on the table any of the arguments that ought to be there, including ideas normally associated with racism or other analogous experiences not personally experienced by the teacher.”³⁸ However, experience shows us that legal theory as a whole expanded considerably with the diverse faculty who generated the scholarship now known as Critical Race Theory; moreover, the establishment of many law school clinics, including Indian Law clinics, was also due to the leadership of diverse faculty.³⁹ A diverse faculty ensures not only intellectual diversity, but also the willingness to critique the legal system “from the outside.” From the margins, the legal system looks very different than it does from the center. It is not at all difficult to see that the type of advocacy promoted by the elites is conceptually aligned with the “center.” In fact, although Lazarus posits that law school clinics could be one mechanism to achieve “a fairer distribution of advocacy expertise,” he admits that this will depend upon the willingness of the law professors and private advocates that staff the Supreme Court clinics at the elite law schools to assume some measure of responsibility—for example by implementing a “systematic program” to allocate their resources, rather than the current “ad hoc” approach. Lazarus also identifies a more pernicious difficulty, namely, that none of the elite advocates will take cases that “might upset their business clients.”⁴⁰ After all, the cost of a social conscience may be the loss of a lucrative client.

As the above discussion illustrates, the problems of inequality and lack of access are pervasive throughout the American legal system, and this has a significant impact on the nature of the legal doctrines that are developed by the United States Supreme Court and by our country’s entire judiciary. Critical Race Theory scholars have been making this basic point for two decades now, often to be met with derision and scorn by their esteemed colleagues. Critical Race Theory, like Critical Feminism, tends to attract scholars who are themselves from marginalized groups, including persons of color, women, and members of the LGBT community. Although there is much talk of the

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, for example, the Indian law Clinics at University of New Mexico, Arizona State University, and the University of Colorado, all of which are under the leadership of Native American faculty members.

⁴⁰ Lazarus, *supra* note 5, at 1562.

“post-racial America,” represented by President Obama’s election, there remains significant racial disparity in faculty hiring within American law schools. For example, in 2008-09, 80.3% of tenured or tenure-track faculty at American law schools were white, and only 14% were persons of color.⁴¹ In 1990-1991, racial and ethnic minorities constituted about a third of new hires, yet by 1996, that percentage had fallen to less than 25%.⁴² In that same 5 year period, the tenure gap between majority and minority law professors went from 14% in 1990-91 to 26% by 1996-97. This represents a significant decline in the hiring and tenuring of minority law faculty.⁴³

Without belaboring the point, it should be obvious that if there is such a limited pool of diverse law professors, the predominant “voice” that is teaching American law students does NOT possess the potential for any significant transformation within the American legal system that would lead to a more fair distribution of goods and freedoms among the least advantaged segments of our society. Indeed, we might imagine that the hierarchies that are currently being created among the “elite” attorneys, law schools, and members of the judiciary will only be enhanced by the vitriolic public backlash against any semblance of the justice forged during the Civil Rights era. As I write this, I am sitting in my vantage point of Arizona, having witnessed a recent spate of legislation decimating affirmative action programs, espousing English-only programs, and denouncing the rights of immigrants (or anyone who resembles an immigrant) and is in the wrong place at the wrong time and without the right I.D.⁴⁴

Critical Race Theory is a vehicle for transformative thought within American jurisprudence.⁴⁵ It is not the only vehicle for transformative thought, of course, but for purposes of this essay, it represents the *type* of thinking that must be undertaken within the legal academy to counter the “quiet transformation” that Lazarus has documented. Critical Race theory has three broad themes which enable its use as a vehicle for the type of transformation that furthers social justice.⁴⁶ First, Critical Race Theory allows us to generate knowledge about social, economic, and legal injustice, and then to examine how injustice is operationalized within our society. The Lazarus article proves this point. Having demonstrated the operationalization of injustice since 1985 through the use of the elite advocates, we can engage various ways of examining the impact of this “quiet transformation” upon our law and our legal institutions. If the corporations have been the “winners” in this era, who are the “losers”? Again, to truly understand the impact of this transformation in the law, it is necessary to shift our focus from the “center” to the “margins.” The Supreme Court has overruled its own precedents, likely setting the stage

⁴¹ Association of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 2008-2009, <http://www.aals.org/statistics/2009dlt/race.html> (last visited Oct. 17, 2011).

⁴² The Racial Gap in Promotion to Tenure of Law Professors: Report of the Committee on the Recruitment and Retention of Minority Law Teachers, Committee Commentary, *available at* <http://www.aals.org/documents/racialgap.pdf> at 3.

⁴³ Of the 14.9% of tenured or tenure track faculty at American law schools, 7% are African-American, 3% are Latino/Hispanic, 2% are Asian or Pacific Islanders, and 0.5% are Native American. Women constitute 37.3% of law professors. Association of American Law Schools, *supra* note 41.

⁴⁴ See, e.g., S.B. 1070, 2010 Ariz. Sess. Laws 113.

⁴⁵ Rebecca Tsosie, *Engaging the Spirit of Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005).

⁴⁶ This analysis was inspired by Professor Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L. J. 85 (1994).

for further impacts on our basic notions of rights, liberties, and responsibilities. To the extent that the “losses” have been occasioned by “procedure” (e.g., the case didn’t even make it through the jurisdictional phase), the impacts may, for a time, remain invisible. They exist nonetheless.

Second, Critical Race Theory endorses a jurisprudence with a basis in an experiential epistemology, rather than a purely rationalist epistemology. The rationalist epistemology, of course, is the one that pervades American legal education. We train law students to analyze the logic of cases and doctrines, to differentiate “relevant” facts from those that are “irrelevant,” and to generate arguments that are based on abstract reason, deductive logic and empirical validation. This generates the view that the Constitution is “color-blind,” and, therefore, allegations that “race” has been used in ways that are “relevant” (i.e., to cause a legal harm, such as wrongful termination or wrongful incarceration) themselves become quite suspect. Naturally, it is very difficult to *prove* intentional discrimination in contemporary society, and the resultant conclusion among those who would not in their own lives encounter such discrimination is the outright denial that discrimination is pervasive within our society.⁴⁷

Critical Race Theory, on the other hand, asserts that the forms of knowledge that are gained from the experiences of people who have suffered and continue to suffer from oppression and injustice are entirely relevant. Through these experiences, often shared in narrative form, we find that American society is far from “color-blind” and that race is often relevant to whether one will be hired, fired, detained by a police officer, followed around in a clothing store, or wrongfully accused of a crime. As Devon Carbado notes, Critical Race Theory allows us to see that “postracialism is quickly emerging as the rhetorical replacement for colorblindness.”⁴⁸ The mainstream American narrative is one of “racial progress,” characterizing U.S. race relations as a history of “linear uplift and improvement.”⁴⁹ As Carbado maintains, this narrative elides the “reform/retranchment dialectic” that more accurately describes America’s legal and political history.⁵⁰

To the extent that those of us within the legal education system buy into the myth that American Constitutional democracy is “color-blind” and equality is the norm *and reality* of American justice, we willingly participate in the further erosion of our basic sense of justice as fairness in the distribution of goods and freedoms. In the so-called “post-racial” America, there is a growing view that we no longer need the so-called “special” protections generated in the Civil Rights Era, such as affirmative action programs. Many states, including Arizona, have abolished the use of affirmative action in higher education or state employment. Anti-affirmative action proponents claim that racial equality is the “norm” and discrimination is an aberration, which can be controlled through litigation, in those rare, “appropriate” cases. Therefore, it will prove unremarkable in the foreseeable future to find that the basic structures of our legal system (including the professors and students at American law schools, the persons hired by the elite law firms, and the persons appointed to the federal Bench or state courts) are

⁴⁷ Two relatively recent Supreme Court cases have raised the bar for simple pleadings to such a high level that it becomes increasingly difficult if not impossible to get a discrimination lawsuit past a Rule 8 hearing and on to discovery: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 7 (2009).

⁴⁸ Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1607 (2011).

⁴⁹ *Id.*

⁵⁰ *Id.*

predominately comprised of the members and the interests of the dominant society.⁵¹ The statistics that I described above for tenured or tenure-track law faculty, for example, purportedly measure “merit” and not “injustice.” Similarly, Critical Race Theory scholar Darren Hutchinson describes the current Supreme Court’s commitment to formal equality as having “effectively inverted the concepts of privilege and subordination,” treating “advantaged classes as if they were vulnerable and in need of heightened judicial protection,” while viewing “socially disadvantaged classes as privileged and unworthy of judicial solicitude.”⁵²

So where does this leave us? The third and potentially most valuable tool within Critical Race Theory is that it gives us a vocabulary and a way to describe the truth of where we are, as Americans, within the contemporary politics of our society. The U.S. Constitution was drafted in 1787, ratified by 1789, and amended at various intervals thereafter to constitute the document that Americans like to proclaim as a model that should inspire other nations to emulate.⁵³ Although the American Constitution served as a global model for many years, some now contend that “America’s days as a constitutional hegemon are coming to an end.”⁵⁴ In particular, Professors David Law and Mila Versteeg point out that “the United States is losing constitutional influence because it is increasingly out of sync with an evolving global consensus on issues of human rights.”⁵⁵ Other countries are more and more being influenced by contemporary norms of international human rights law, which in turn are refining our basic view, *as a global society*, of the rights of human beings. Jurists in other countries are also concerned about the United States Supreme Court’s reluctance to accord “decent respect to the opinions of mankind by participating in an ongoing ‘transnational judicial dialogue.’”⁵⁶ The current Supreme Court manifests the notorious “American exceptionalism” and isolationism that has so often worked to our disadvantage as a country. In fact, Derrick Bell noted that the result in *Brown v. Board of Education* was in part attributable to the United States’ need to “provide credibility” to the United States at a time when the country was struggling with communist countries in order “to win the hearts and minds of emerging third world people.”⁵⁷

Critical Race Theory invites us to examine whether American “justice” is truly aligned with the goals and objectives promoted by the U.S. Constitution, particularly the Civil War Amendments. Where a *formal neutrality* is employed to mask injustice, Critical Race Theory provides the tools to identify how power and privilege are being allocated (or misallocated) in order to achieve particular objectives. To the extent that the United States is denying the social reality within its borders, Critical Race Theory

⁵¹ See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976) (holding that disproportionate impact in hiring must be motivated by a discriminatory purpose to be actionable as a violation of equal protection).

⁵² Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 (2003). This argument is akin to maintaining, “The rich are too poor! The poor are too rich!”

⁵³ See David S. Law and Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. (forthcoming 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923556.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 5 and notes 14-16.

⁵⁷ Bell, *supra* note 30, at 23.

allows for the full expression of what is occurring at this moment in time. “Post-Racial” America implies the legitimacy of a “Post-Civil Rights” legal system. Critical Race Theory allows us to examine whether our assumptions are justifiable or whether justice is illusory in such a “Post-Racial” America.

Is the American Constitution a relic of a bygone era or can it be informed by international human rights law? These are some of the questions that the next generation of Critical Race Theory scholars will address.⁵⁸ These are also questions that scholars of Federal Indian Law *must* address. As David Getches notes in a 2001 article documenting the retrenchment of the Supreme Court in the field of Federal Indian law, the losses suffered by tribal clients may merely reflect the predominant themes of the Supreme Court’s jurisprudence, rather than any *specific* animosity toward Indians.⁵⁹ Getches identifies “three remarkably consistent trends” that can be documented by the Supreme Court’s activity from the mid-1980’s to the present time: “Virtually without exception, state interests prevail; attempts to protect the specific rights of racial minorities fail; and mainstream values are protected.”⁶⁰ As Getches further notes, virtually every Indian law case by its nature will implicate one of these themes, and this has set the stage for what we now understand to be a virtual avalanche of losses for tribal litigants and the wholesale destruction of the foundational doctrines of Federal Indian law that heretofore validated principles relevant to tribal sovereignty and territorial jurisdiction.

Power and privilege have always been asserted to shape our collective future. Those of us who manage to get into the American law schools, as students or as teachers, enjoy significant privilege, and that privilege carries a responsibility. How will we use our power, as advocates, judges, or scholars? Whose lives will we benefit? Whom will we harm? Will we have the courage to see the harms that are invisible to the dominant society? If we see those harms, will we act to redress them, or will we join the collective denial, even amnesia that is so pervades our society?

III. The Challenge for Arizona and for Arizona State University

I will conclude this essay with a brief note about the challenge for those of us in Arizona, specifically at Arizona State University. ASU houses the Sandra Day O’Connor College of Law, the second public law school founded in Arizona (the University of Arizona housing the state’s first). I would like to acknowledge the tremendous contributions of my esteemed colleague in Federal Indian Law, Professor Robert A. Williams, Jr., of the University of Arizona law faculty, to the field of Federal Indian law and to legal education, generally. Professor Williams, a member of the Lumbee Tribe of North Carolina and a Harvard law graduate, was the first scholar to draw the connections between Critical Race Theory and Federal Indian law, and also one of the first to suggest that international human rights law could provide a transformative space for the

⁵⁸ See Carbado, *supra* note 48, at 1638-1640 (maintaining that CRT scholars should continue to engage global affairs and noting that international legal norms and political advocacy are increasingly becoming mechanisms to effectuate domestic racial reform).

⁵⁹ David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of State’s Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

⁶⁰ *Id.* at 268.

aspirations of indigenous people.⁶¹ Professor Williams' academic leadership has been visionary and extraordinarily influential, and he has been an outstanding mentor for many Native scholars, including me. Professor Williams continues to advocate the use of international human rights law as a normative construct to measure the "justice" of the Supreme Court's jurisprudence, which is very much aligned with the scholarship in global constitutionalism.

Professor Williams, in fact, encouraged me to teach law. I arrived at the ASU College of Law in 1993, as a young visiting professor, and in 1998, I became the first and only woman of color on the tenured ASU law faculty, and the first and only Native American professor to be tenured at the law school. In 2011, I am *still* the only woman of color on the tenured law faculty, and I greatly miss my colleague, Professor Kevin Gover, who is the second tenured Native American on this law faculty, but is currently on leave, serving as the Director of the National Museum of the American Indian in Washington, D.C.

I feel very blessed that I remember the legacy of the ASU College of Law under its founding Dean, Willard H. Pedrick. Dean Pedrick had retired by the time I joined the law faculty, but he remained a warm and supportive presence for all of us, and his sense of humor and kind nature made our law school a better place. Dean Pedrick modeled the physical structure of our building upon the traditional Navajo dwelling known as a "Hogan," an octagonal structure with an opening that points toward the heavens. Dean Pedrick was fascinated with the Native American people in the Southwest, and he wanted to create a law school that would respond to the people and cultures of this region, including Native Americans and Latinos. This legacy was fostered by the admission of students from Arizona tribes, including Ben Hanley, the late Claudeen Bates-Arthur, Louis Denetsosie, and Herb Yazzie, all of whom went on to serve in leadership roles at the state, tribal and national levels.⁶² Venerable Ninth Circuit Judge William Canby started his legal career in Arizona as an ASU law professor, becoming one of the first law professors in the country to teach Federal Indian law, and designing programs to assist the development of local tribal court systems.

I feel blessed that in the 18 years that I have taught at the ASU College of Law—now known as the Sandra Day O'Connor College of Law—I have had the pleasure of teaching and mentoring an outstanding array of students, many of whom have gone on to serve as leaders at the state, tribal, and national levels. The students I have taught have been incredibly diverse. I have had men, women, young students, second-career students, students from big cities, students from small, local communities, and students

⁶¹ Professor Robert A. Williams, Jr. is the E. Thomas Sullivan Professor of Law and American Indian Studies at the University of Arizona, and he also serves as Director of the Indigenous Peoples Law and Policy Program at the University of Arizona College of Law. Professor Williams is the author of several influential books, including *Like a Loaded Weapon*, which presents a very effective critique of the U.S. Supreme Court's Indian law jurisprudence. Professor Williams and Professor S. James Anaya, also of the University of Arizona College of Law, are the leading experts on international human rights law, as it applies to indigenous peoples. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004).

⁶² Ben Hanley, ASU Law Class of 1971, served in the Arizona state legislature; Claudeen Bates-Arthur, Class of 1974, served as the Navajo Nation's Attorney General and Chief Justice of the Navajo Nation Supreme Court; Louis Denetsosie, Class of 1974, former Attorney General for the Navajo Nation Department of Justice; and Herb Yazzie, Class of 1975, is the former Attorney General of the Navajo Nation and current Chief Justice of the Navajo Nation Supreme Court.

from every ethnic and racial group, with diverse politics and religious views. The Indian Legal Program has been a primary contributor to student diversity at the law school, attracting an outstanding array of Native students, from every geographic region and locale of the country, and many from Canada as well. I believe that Dean Pedrick's vision of an inclusive law school committed to diversity has allowed our law school to participate in the creation of justice: at the state, tribal, and national levels.

I am concerned when I look ahead, however, because I know that Dean Pedrick's vision must be retained if we are to serve our mission as one of the two *public* law schools in the state. I do assume that private law schools often have an agenda driven by the interests that fund their continued growth and existence; they are like corporations in that way, and, although there are many "public interest" programs at private law schools, I would venture a guess that they align with the institution's other interests. I believe, however, that public law schools have a responsibility to facilitate access to justice by all members of society. We have the responsibility to train our future leaders to be outstanding advocates, judges, scholars, and politicians. This means that we must encourage clear and critical thinking, and allow the development of a global consciousness about rights and justice. We cannot afford to operate from the old consciousness about American Constitutional exceptionalism. We cannot use the fiction of "neutrality" and "toleration" to deny fundamental rights to equal treatment and respect to the least-advantaged groups within our society or within our world.

The challenges are significant. We have a state-wide ban on affirmative action, which affects both hiring practices and student recruitment. We must contend with the severe budget cuts imposed on all of the state Universities, and we must acknowledge the widespread call for academic units, such as the law school, to increasingly seek private funding. On the plus side, ASU is rising in the rankings of American law schools, according to *U.S. News and World Report*.⁶³ This means that the law school will increasingly have the ability to attract "quality" students in the competitive world of law school admissions. It will also enhance the "quality" of its law faculty in future hiring. Of course, we must be cognizant of what measures we use in assessing the "quality" of our students or our faculty.

Is the Sandra Day O'Connor College of Law on the road to becoming an "elite" law school? Will we become subject to pressures not to "cause offense" to the wealthy or powerful interests that will come to more fully support our law school? These are issues that we must engage on the road ahead. I am very proud of the students and faculty who support the *ASU Law Journal for Social Justice* because this journal is a very important way to document what is actually happening as we move forward in pursuit of justice. Law schools promote the ability to think critically about the future that we are committed to creating. We must understand what is actually being taught in our law school curriculum, how it is taught, and who teaches it. The narratives of power and privilege are firmly rooted in American Constitutional law, whereas the counter-narratives, to the extent that they exist at all, are most often found in courses in Critical Race Theory or Indian Law—courses *not* considered "core" parts of law school curricula. The *Law Journal for Social Justice* represents a very important mechanism for transformation, as do the various Clinical Programs that assist members of our society who would otherwise

⁶³ *Best Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Oct. 17, 2011).

lack access to the legal system. It is my personal intention to support a robust version of justice within the legal system on the road ahead, including the commitment to support the ability of law students to be “justice-makers” within our society. We must never forget that the law is always undergoing a process of transformation. The only question is who directs this transformation and whether we are willing to accept the consequences if we abdicate this power to others.